

FILED & ENTERED

OCT 25 2019

CLERK U.S. BANKRUPTCY COURT
Central District of California
BY bakchell DEPUTY CLERK

**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

NORA MAGDALENA LAVIE,

Alleged Debtor.

Case No. 2:19-bk-19679-RK

Chapter 7

**MEMORANDUM DECISION AND ORDER
DENYING AND DISMISSING WITHOUT
PREJUDICE INVOLUNTARY CHAPTER 7
PETITION WITH LEAVE TO PETITIONING
CREDITOR TO FILE AND SERVE AN
AMENDED PETITION WITHIN 14 DAYS OF
THE DATE OF ENTRY OF THIS DECISION
AND ORDER**

Date: October 23, 2019

Time: 11:30 a.m.

Place: Courtroom 1675
Roybal Federal Building
255 East Temple Street
Los Angeles, CA 90012

This involuntary bankruptcy case under Chapter 7 of the Bankruptcy Code, 11 U.S.C., came on for hearing on October 23, 2019 before the undersigned United States Bankruptcy Judge for a status conference on the involuntary bankruptcy petition filed by Petitioning Creditor Michael Z. Lavie ("Petitioning Creditor"). Petitioning Creditor and Alleged Debtor Nora Magdalena Lavie ("Alleged Debtor") appeared at the status

1 conference in this involuntary bankruptcy case on October 23, 2019. Petitioning
2 Creditor and Alleged Debtor are former spouses as indicated in the pleadings, and
3 Alleged Debtor stated that her preferred name is Nora Magdalena Ibarra. No other
4 appearances were made.

5 On August 19, 2019, Petitioning Creditor commenced this bankruptcy case by
6 filing an involuntary bankruptcy petition against Alleged Debtor under Chapter 7 of the
7 Bankruptcy Code (Docket No. 1). In the petition, Petitioning Creditor alleged that the
8 grounds for relief are that within 120 days before the filing of the petition, a custodian,
9 other than a trustee, receiver, or agent appointed to take charge of less than
10 substantially all of the property of the debtor for the purpose of enforcing a lien against
11 such property, was appointed or took possession. Petition, Docket No. 1, at 3; *see also*,
12 11 U.S.C. § 303(h)(2). Petitioning Creditor made this allegation in the Petition by
13 checking a box on the form petition that these grounds were the basis for relief in this
14 case. *Id.* On September 4, 2019, Alleged Debtor filed a written opposition to the
15 petition (Docket No. 11).

16 At the status conference on October 23, 2019, ¹ Petitioning Creditor admitted that
17 this allegation was incorrect in that there is no such custodian who has been appointed
18 or took possession of substantially all of the property of the debtor. Petitioning Creditor
19 stated that another person prepared the petition for him and that it was this other person
20 who made the error of making this allegation by checking off the box that the
21 appointment of a custodian or that a custodian took possession of the debtor's assets
22 was the basis for relief in the petition.

23 Because the alleged basis for relief in the involuntary bankruptcy petition under
24 11 U.S.C. § 303(h)(2) that a custodian was appointed or took possession of
25 substantially all of the debtor assets is erroneous, the court on its own motion pursuant
26

27 ¹ The status conference in this involuntary bankruptcy case was originally scheduled for October 1, 2019,
28 but was continued to October 23, 2019 by a prior order granting the motion of Petitioning Creditor for
continuance (Docket No. 12, filed on September 24, 2019, and Docket No. 13, filed and entered on
September 25, 2019).

1 to 11 U.S.C. § 105(a) and Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of
2 Bankruptcy Procedure 1011 and 1013 denies and dismisses the petition without
3 prejudice, but grants leave to Petitioning Creditor to file and serve an amended petition
4 within 14 days of the date of entry of this order pursuant to Federal Rule of Civil
5 Procedure 15(a)(2) and Federal Rules of Bankruptcy Procedure 7015 and 9014.

6 The court on its own motion dismisses the involuntary petition with leave to
7 amend, relying upon 11 U.S.C. § 105(a), and not on 11 U.S.C. § 303(j), which
8 specifically relates to dismissals of involuntary bankruptcy petitions. As noted in *Collier*
9 *on Bankruptcy*, 11 U.S.C. §303(j) is not the only statutory provision for dismissal of an
10 involuntary bankruptcy petition as “[i]t has been held that an involuntary petition may be
11 dismissed under [11 U.S.C.] section 707(a) or 1112. 2 Levin and Sommer, *Collier on*
12 *Bankruptcy*, ¶ 303.35 at 303-120 (16th ed. 2019), *citing*, *Wilk Auslander LLP v. Murray*
13 *(In re Murray)*, 565 B.R. 527 (S.D.N.Y. 2017). In *In re Murray*, the district court affirmed
14 the bankruptcy court’s dismissal of an involuntary Chapter 7 bankruptcy case “for
15 cause” under 11 U.S.C. § 707(a), holding that based on an analysis of the statutory
16 language of 11 U.S.C. §§303 and 707(a) and applicable case law, § 303 is not the only
17 basis for dismissal of an involuntary Chapter 7 bankruptcy case as dismissal “for cause”
18 under § 707(a) is not limited to voluntary Chapter 7 bankruptcy cases because there is
19 no distinction between voluntary and involuntary Chapter 7 bankruptcy cases in that
20 statutory provision. 565 B.R. at 531-532, *citing and quoting inter alia*, *In re MacFarlane*
21 *Webster Associates*, 121 B.R. 694, 696 (Bankr. S.D.N.Y. 1990) (“The wording of the
22 statute [11 U.S.C. § 707(a)] indicates that it covers both voluntary and involuntary
23 cases, *compare* §707(a) *with* §707(a)(3).”). While the court also does not rely upon 11
24 U.S.C. § 707(a) as an alternative statutory basis for dismissal applicable to Chapter 7
25 bankruptcy cases here (or 11 U.S.C. § 1112 applicable to Chapter 11 bankruptcy
26 cases), the court cites *In re Murray* as supporting the proposition that 11 U.S.C. § 303(j)
27 is not the sole statutory basis for dismissal of an involuntary Chapter 7 bankruptcy case.
28 Moreover, this is also shown in the statutory language of 11 U.S.C. § 303(j) which

1 states: “Only after notice to all creditors and a hearing may the court dismiss a petition
2 filed under this section—(1) on the motion of a petitioner; (2) on consent of all
3 petitioners and the debtor; or (3) for want of prosecution.” That is, nothing in this
4 statutory language indicates that 11 U.S.C. § 303(j) is the exclusive statutory basis for
5 dismissal of an involuntary Chapter 7 bankruptcy case or that it applies to dismissal of
6 an involuntary Chapter 7 bankruptcy case on the court’s own motion.

7 Dismissal of an involuntary bankruptcy case pursuant to 11 U.S.C. §§ 303(j),
8 707(a) and 1112 require notice to all creditors and a hearing, but dismissal here on the
9 court’s own motion is pursuant to 11 U.S.C. § 105(a) without notice to all creditors and
10 without a hearing after such notice. *See, In re Davis*, 278 B.R. 429 (Bankr. W.D. Mich.
11 2002) (holding that an involuntary Chapter 7 bankruptcy case brought by a criminal
12 defendant against the prosecutor and the judge in the criminal case for purposes of
13 harassment was an abuse of process and dismissal by the court *sua sponte* (on its own
14 motion) was appropriate and proper under 11 U.S.C. § 105(a)).

15 11 U.S.C. §105(a) states:

16 The court may issue any order, process, or judgment that is necessary or
17 appropriate to carry out the provisions of this title. No provision of this title
18 providing for the raising of an issue by a party shall be construed to preclude the
19 court from, *sua sponte*, taking any action or making the determination necessary
or appropriate to enforce or implement courts orders or rules, or to prevent an
abuse of process.

20 In the case now pending before the court, the court determines that dismissing
21 the petition on its own motion is necessary and appropriate pursuant to 11 U.S.C. §
22 105(a) to carry out the provisions of the Bankruptcy Code, namely, 11 U.S.C. § 303,
23 because the petition as currently pleaded is defective based on the admissions of
24 Petitioning Creditor that an erroneous basis for relief is pleaded and thus, the
25 involuntary case cannot go forward to a determination of the issues of a contested
26 involuntary petition as to whether an order for relief should be entered at the earliest
27 practicable date as contemplated by Federal Rule of Bankruptcy Procedure 1013(a).
28 Petitioning Creditor must amend the petition and allege a proper basis for relief in order

1 for the involuntary case to put Alleged Debtor on “fair notice” of his claim in order for the
2 case to proceed. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (a
3 pleading must give “fair notice” of the claim being asserted and the “grounds upon
4 which it rests”) (citation omitted). Thus, the court denies the petition as incorrectly
5 pleaded and gives an opportunity for the Petitioning Creditor to amend his pleading in
6 order for the case to go forward as the court having reviewed the petition determines
7 that it does not give fair notice of a proper claim for relief under 11 U.S.C. § 303. The
8 court further determines that there is no need to give notice to all creditors with a
9 hearing thereafter where Petitioning Creditor has admitted on the record that the petition
10 is incorrectly pleaded.

11 In sum, in order for the court to fulfill its responsibility that the issues in this
12 involuntary bankruptcy case regarding whether an order for relief should be entered are
13 determined at the earliest practicable date as required by Federal Rule of Bankruptcy
14 Procedure 1013(a), the court relies upon its statutory authority under 11 U.S.C. § 105(a)
15 in carrying out its administration of this involuntary bankruptcy case under 11 U.S.C. §
16 303. There is no prejudice to other parties by dismissal of the petition on this basis
17 because Petitioning Creditor is given leave to amend and remedy his defective
18 pleading, and because any other creditors are unaffected as the petition would have
19 been otherwise denied and dismissed at a merits hearing whether an order for relief
20 should be entered based on Petitioning Creditor’s admission that the petition is
21 incorrectly pleaded under 11 U.S.C. § 303.

22 The court grants leave to Petitioning Creditor to amend the petition because he
23 stated at the status conference that he could allege a proper basis for relief in an
24 amended petition and the court should freely give leave to amend when justice so
25 requires pursuant to Federal Rule of Civil Procedure 15(a)(2). However, if Petitioning
26 Creditor does not file and serve an amended petition within 14 days of the date of entry
27 of this order, the court orders that this involuntary bankruptcy case is dismissed without
28 prejudice. Although Petitioning Creditor requested more time to amend his petition at

1 the status conference, the court orally denied his request because the time period of 14
2 days is ample for Petitioning Creditor to amend his petition because if he now knows
3 that the petition was incorrectly pleaded, he knew that at the time when he filed his
4 petition how it should been correctly pleaded and he should know now how to correctly
5 plead his claim for relief.

6 For the foregoing reasons, the court on its own motion denies and dismisses the
7 petition without prejudice, but grants leave to Petitioning Creditor to file and serve an
8 amended petition within 14 days of the date of entry of this order, and if Petitioning
9 Creditor does not file and serve an amended petition within 14 days of the date of entry
10 of this order, the court orders that this involuntary bankruptcy case is dismissed without
11 prejudice.

12 IT IS SO ORDERED.

13 ###

14
15
16
17
18
19
20
21
22
23
24
25 Date: October 25, 2019



Robert Kwan
United States Bankruptcy Judge